

Before the
Federal Communications Commission
Washington, D.C. 20554

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AUG 26 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Retention by Broadcasters of
Program Recordings)
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MB Docket No. 04-232

COMMENTS OF REGENT COMMUNICATIONS, INC.

On July 7, 2004, the Commission released a Notice of Proposed Rulemaking seeking comments regarding its proposed requirement that broadcasters retain recordings of all material aired between the hours of 6 a.m. and 10 p.m. for a period of time, such as 60 or 90 days, in order to assist the Commission in the enforcement of the restrictions on obscene and indecent programming imposed under Federal law and the Commission's Rules.¹ For the reasons stated herein, Regent Communications, Inc. ("Regent") opposes any such requirements.

Through subsidiaries, Regent owns and operates 75 radio stations (56 FM and 19 AM) clustered primarily in 15 medium and small radio markets in California, Colorado, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, New York, Pennsylvania, and Texas. Regent is a publicly traded company that acquired its first radio station in 1997. Regent takes very seriously its responsibility as a steward of Commission licensees, and accordingly, takes great care to assure compliance at its stations with the Commission's rules and regulations regarding indecency and obscenity.

Regent recognizes the importance of federal regulation of obscene and indecent programming, and acknowledges the vital— and at times difficult — role the Commission plays in enforcing its regulations. However, Regent believes that the Commission's proposals are

¹ 18 U.S.C. §1464 and 47 C.F.R. 73.3999.

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sweepingly overbroad and unnecessary, and would impose an unfair burden on broadcasters, particularly small and mid-sized broadcasters that are likely to have fewer resources to devote to compliance with the proposed rules.

I. The Commission's Proposed Rules Are Overbroad and Are Not Necessary to Effectively Enforce the Restrictions on Indecent and Obscene Programming

Under the Commission's proposed rules, broadcasters would be forced to implement additional operational procedures and undertake large capital investments regardless of their prior record of compliance with the Commission's obscenity and indecency rules, whether they have implemented effective procedures to prevent violations of such rules, or whether their programming is of a nature that is unlikely to result in a violation of those rules. Before even taking into consideration the necessity of recording multiple streams of digital programming or the need for redundant back-up recording systems, this proposal would have the effect of forcing nearly 18,000 broadcast stations² to acquire equipment, and implement procedures, to record up to sixteen hours of programming per day and store those recordings for several months.

In addition to being overbroad in the sense that they impose substantial burdens on all broadcasters regardless of the likelihood that they may violate the Commission's indecency and obscenity rules, the sweeping new rules proposed by the Commission are unnecessary for the Commission to effectively enforce the restrictions on obscene and indecent programming. The recent spate of Commission enforcement actions amply demonstrates that the Commission has effective enforcement tools available to it if it has the will to use them.³ Moreover, the

² See *FCC News Release*, August 20, 2004 (17,960 full power radio, television, Class A television, and low power television stations licensed as of June 30, 2004).

³ See, e.g., *In the Matter of Clear Channel Communications, Inc.*, Order and Consent Decree, FCC 04-128 (rel. June 9, 2004) (Clear Channel entered into a consent decree under which it agreed to implement and aggressively enforce a company-wide compliance plan to prevent the broadcast of indecent material and agreed to contribute \$1,750,000 to the

Commission has not demonstrated a pressing need to enhance the one aspect of enforcement to which the Commission's proposal is limited; availability of a record of the programming at issue. To the contrary, the Commission's own data demonstrate the lack of such a need. Between 2000 and 2002, the Commission received 14,379 complaints alleging indecent or obscene programming, covering 598 programs, and denied or dismissed only 169 such complaints for lack of tape, transcript or significant except.⁴ Hence, only 1.18% of the complaints were denied or dismissed for lack of a tape or transcript.⁵ Indeed, there is no record evidence that lack of recordings has presented any impediment to enforcement of the Commission's indecency and obscenity policies.⁶ The Commission should not impose substantial burdens on all broadcasters to address an issue of such small dimensions.

II. The Commission's Proposal will Impose Substantial Burdens on Broadcasters

In addition to being overly broad and unnecessary, the Commission's proposal will impose significant financial and operational burdens on broadcasters, particularly small and mid-sized broadcasters. Regent estimates that the installation of a digital recording system would

U.S. Treasury), and *In the Matter of Emmis Communications Corporation*, Order and Consent Decree, FCC 04-199 (rel. Aug. 12, 2004) (Emmis entered into a consent decree under which it agreed to adopt and aggressively enforce a company-wide compliance plan to prevent the broadcast of indecent material and agreed to contribute \$300,000 to the U. S. Treasury).

⁴ See *In the Matter of Retention by Broadcasters of Program Recordings*, FCC 04-145 at note 8 (rel. July 7, 2004) (referring to Letter from Chairman Michael K. Powell to the Hon. John Dingell, March 2, 2004).

⁵ Assuming the 14,379 complaints were evenly distributed over the 598 programs (i.e., approximately 24 complaints per program), the dismissal of 169 complaints would mean that complaints with respect to approximately seven of the 598 programs were dismissed or denied for lack of a tape or transcript.

⁶ It merits mention that the primary event leading to this proceeding, the half-time show at the 2004 Super Bowl, certainly did not present an enforcement issue for lack of recorded evidence.

cost approximately \$4,500 per unit. Regent predicts that it would have to install two recording units per station to protect against inevitable equipment failure, making the total cost of equipment for Regent's 75 stations \$675,000. Furthermore, in the event that Regent stations decide to implement In-Band On-Channel (IBOC) operation and broadcast digital signals in addition to analog signals, and assuming the Commission imposes any program retention requirements it may adopt on digital as well as analog broadcasts, the cost of recording would double to \$1,350,000. Add to this figure the capital that will have to be invested in personnel, maintenance, monitoring and repair, and the total expenditure will be substantial. Regent would, of course, earn no financial return on this investment whatsoever. Rather, revenues would need to be diverted from other station operations to cover the costs, diluting Regent's financial ability to provide service in its markets.

III. Conclusion

The Commission's proposed rules would impose significant burdens on all broadcasters, but the burden would fall most heavily on small and mid-sized broadcasters with fewer resources to invest in compliance. The Commission has failed to show that the proposed rules are necessary to enhance the Commission's enforcement processes. Indeed, the Commission's enforcement record indicates that the proposal will likely have very little impact on its ability to enforce its indecency and obscenity rules. In addition, the Commission has failed to narrowly-tailor a proposal focused on broadcasters with a history of significant non-compliance with the Commission's indecency rules or on those otherwise likely to commit future violations of the rules. These omissions lead to the conclusion that the adoption of the Commission's proposed rules is likely to constitute arbitrary and capricious rulemaking based upon the failure to make a reasoned decision. Regent urges the Commission not to adopt its proposal.

Respectfully Submitted,

Regent Communications, Inc.



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Date: August 26, 2004